

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT COURT OF MISSISSIPPI
JACKSON DIVISION

LEWIS GASKEW, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:05cv09WSu

AIRGAS-GULF STATES, INC.; A. O. SMITH CORPORATION; ARCOS INDUSTRIES, L.L.C., as Successors to ARCOS ALLOYS CORPORATION; B AND R INDUSTRIAL SUPPLY, INC.; THE BOC GROUP, INC. f/k/a AIRCO, INC.; CAPWELD, INC.; CATERPILLAR, INC.; COLUMBIA WELDING SERVICE, INC.; THE DOW CHEMICAL CORPORATION; DELORO STELLITE COMPANY, INC.; EILAND'S WELDERS SUPPLY, INC.; THE ESAB GROUP, INC.; EUTECTIC CORPORATION; GENERAL ELECTRIC COMPANY; GULF COAST MARINE SUPPLY COMPANY; GULF TC CORPORATION as Successor to GULF WELDING EQUIPMENT COMPANY, INC.; HOBART BROTHERS COMPANY; ILLINOIS TOOL WORKS, INC.; INDUSTRIAL WELDING SUPPLIES OF HATTIESBURG, INC. d/b/a NORDAN SMITH; THE LINCOLN ELECTRIC COMPANY; LINCOLN ELECTRIC HOLDINGS, INC.; LINDE GASES OF THE SOUTH, INC. as Successor to MON-ARC WELDING SUPPLY, INC. as Successor to MOBILE WELDING SUPPLY CO., INC. as Successor to MOBILE WELDING SUPPLY COMPANY, INC.; MAGNOLIA WELDING SUPPLY CO., INC.; METROPOLITAN LIFE INSURANCE COMPANY; MILLER ELECTRIC MFG. CO. a/k/a MILLER ELECTRIC MANUFACTURING CO., INC.; PRAXAIR, INC.; SANDVIK, INC.; SELECT ARC, INC.; SOCRA CORPORATION as Successor to ARCOS ALLOYS CORPORATION; STOODY COMPANY; TDY INDUSTRIES, INC.; THERMADYNE HOLDINGS CORPORATION a/k/a THERMADYNE INDUSTRIES, INC.; UNION CARBIDE CORPORATION; UNION CARBIDE CHEMICALS AND

PLASTICS COMPANY, INC.; VIACOM INC.;
WELDING ENGINEERING SUPPLY CO., INCORPORATED;
WESTINGHOUSE ELECTRIC CORPORATION; and
JOHN DOE DEFENDANTS A-Z

DEFENDANTS

PLAINTIFFS' MOTION FOR REMAND

COME NOW Plaintiffs, by and through their counsel of record and file this their Motion for Remand, as follows:

1. On August 27, 2004, Plaintiffs filed their Complaint in the Circuit Court of the Second Judicial District of Hinds County, Mississippi against Defendants Airgas-Gulf States, et al.

2. Plaintiffs are adult resident citizens of the State of Mississippi.

3. The following Defendants are Mississippi corporations and/or Mississippi residents: Industrial Welding Supplies of Hattiesburg, Inc., d/b/a Nordan Smith, Capweld, Inc., Eiland's Welders Supply, Inc., B & R Industrial Supply and Columbia Welding Service, Inc. The Non-Mississippi Defendants are Airgas-Gulf States, Inc.; A. O. Smith Corporation; ARCOS Industries, L.L.C., as Successors to ARCOS Alloys Corporation; The BOC Group, Inc. f/k/a Airco, Inc; Caterpillar, Inc.; The Dow Chemical Corporation; Deloro Stellite Company, Inc.; The ESAB Group, Inc.; Eutectic Corporation; General Electric Company; Gulf Coast Marine Supply Company; Gulf TC Corporation as Successor to Gulf Welding Equipment Company, Inc.; Hobart Brothers Company; Illinois Tool Works, Inc.; The Lincoln Electric Company; Lincoln Electric Holdings, Inc.; Linde Gases of the South, Inc. as Successor to Mon-Arc Welding Supply, Inc. as Successor to Mobile Welding Supply Co., Inc. as Successor to Mobile Welding Supply Company, Inc.; Magnolia Welding Supply Co., Inc.; Metropolitan Life Insurance Company; Miller Electric Mfg. Co. a/k/a Miller Electric Manufacturing Co., Inc.; Praxair, Inc.; Sandvik, Inc.; Select Arc, Inc.; SOCRA Corporation as Successor to ARCOS

Alloys Corporation; Stooddy Company; TDY Industries, Inc.; Thermadyne Holdings Corporation a/k/a Thermadyne Industries, Inc.; Union Carbide Corporation; Union Carbide Chemicals and Plastics Company, Inc.; Viacom Inc.; Welding Engineering Supply Co., Incorporated; and Westinghouse Electric Corporation.

4. The Removing Defendants¹ filed a Notice of Removal on January 4, 2005, pursuant to 28 U.S.C. § 1441 and 1446. The Removing Defendants claim that this Court has jurisdiction under 28 U.S.C. § 1332, and that the Mississippi Defendants should be disregarded for determining diversity jurisdiction because they were fraudulently joined solely to defeat diversity jurisdiction in federal court.

5. The Mississippi Defendants were not fraudulently joined, and Plaintiffs have a possibility of recovering against such Defendants pursuant to Miss. Code Ann. § 11-1-63.

6. This Court lacks subject matter jurisdiction under 28 U.S.C. § 1332 in that the Complaint contains Mississippi resident Plaintiffs and Mississippi resident Defendants.

7. Pursuant to 28 U.S.C. § 1441(b), this action is not removable as the Mississippi Defendants were properly joined and served and are citizens of the State of Mississippi. See, Memorandum and Order, In Re: Welding Rod Litigation, United States District Court Northern

¹ Defendants filing a Notice of Removal were the Lincoln Electric Company, A. O. Smith Corporation; the ESAB Group, Inc.; Eutectic Corporation; Hobart Brothers Company; Praxair, Inc.; Linde Gases of the South, Inc., as Successor to Mon-Arc Welding Supply, Inc., as Successor to Mobile Welding Supply Co., Inc., as Successor to Mobile Welding Supply Company, Inc. and to Magnolia Welding Supply Co., Inc., Sandvik, Inc.; Union Carbide Corporation and Union Carbide Corporation in its capacity as the successor in interest to Union Carbide Plastics and Chemicals Company, Inc.; Viacom, Inc., successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation; TDY Industries, Inc. (Teledyne-McKay); The BOC Group, Inc. formerly known Airco, Inc.; formerly known as BOC Financial Corp.; and Airgas-Gulf States, Inc. The Defendants will be collectively referred to as "the Removing Defendants."

Memorandum and Order, In Re: Welding Rod Litigation, United States District Court Northern District of Ohio, Eastern Division, Case No. 1:03-CV-17000, MDL Docket No. 1535.

(Exhibit "A")

8. The Removing Defendants have failed to comply with the procedural requirements of 28 U.S.C. § 1446. All Defendants did not join in removal of this case to Federal Court.

9. The Removing Defendants appear to reference 28 U.S.C. § 1442, Federal Officer Removal, as a basis for removal of this case to Federal Court. To the extent that the Removing Defendants are relying on § 1442, federal jurisdiction would be impossible due to the fact that no welding Plaintiff in this case has been exposed to fumes on any Federal Government work site or contracted property. *See, Gillory v. Ree's Contract Service, Inc.*, 872 F. Supp. 344, 347-48 (S.D. Miss. 1994) (where defendants cannot demonstrate the type of evidence necessary to support federal officer removal, plaintiffs' motion to remand must be granted.)

10. Plaintiffs specifically deny all allegations asserted in Defendants' Notice of Removal.

11. In support of this Motion, movants rely on the pleadings and their Memorandum Brief in support of their Motion for Remand.

DATED, this the 2nd day of February, 2005.

Respectfully submitted,

BY: C. Victor Welsh, III
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I, C. Victor Welsh, III, do hereby certify that I have served a true and correct copy of the above and foregoing ***Motion to Remand*** by United States mail to the following counsel of record:

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